

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Rules and Regulations)	CG Docket No. 05-338
Implementing the Telephone)	
Consumer Protection Act)	
of 1991)	
)	
Junk Fax Prevention Act of 2005)	
_____)	

REPLY COMMENTS OF ROBERT BIGGERSTAFF

Robert Biggerstaff (“Commenter”) hereby submits these reply comments as timely filed in the Commission’s NPRM (FCC 05-206), Docket 05-338.

I agree with the statement of one industry commenter in the related docket 02-278: “Businesses use a variety of faxes to communicate with their customers: Purchase orders, copies of orders, order confirmation, invoices, copies of invoices, drawings and artwork proofs, sales tax exemptions, among others.” Notably, none of these items are advertisements, but all are interfered with by the billions of junk faxes consuming paper and other supplies, and tying up the fax lines.

The mantra repeated in nearly every industry filing in this docket, is that restrictions on faxing prevent recipients from receiving “valuable” information. This, of course, depends on perspective. The telemarketing industry said the same thing about unsolicited telemarketing calls, yet people still universally hate telemarketers, and the signups to the national DNC list are over 100 million households. The unfortunate economics of cost-shifted method of advertising like telemarketing and junk faxing, make it economically attractive to offend 99 people in order to find one person who is receptive to the offer.

The fact is that while the advertiser thinks his missives are wanted and desired (they always do), the vast majority of their victims do not want those missives. The small minority who may want the junk faxes can not be justification for forcing the majority to submit. As was mentioned very early in comments to the Commission in the context of telemarketing, to do so would be like forcing all the patrons at a bar to endure being groped, just because one person at the bar will find it desirable and the groper gets to grope all of them to find the one exception.

Self interests

The Commission must also consider that many of the organizations filing comments appear to be serving their own selfish organizational self interests (to junk fax their own members with offers irrelevant to their membership as the National Federation of Independent Business (“NFIB”) was found guilty of doing in Missouri) rather than truly serving the silent majority of their members who don’t send, and don’t want, junk faxes. Similarly, as other commenters have pointed out, the non-profit groups have advocated for a non-profit exemption to the opt-out notice, while for-profit fax advertisers have argued against it. It seems as if the ox owners are all protecting their own oxen from being gored without regard to the oxen of others in the ring. I urge the Commission to take this into account when evaluating proposals of those who are, after all, foisting the cost of printing their advertising onto an unsuspecting fax machine owner.

What NFIB did in Missouri is symptomatic of what many membership organizations claim is “legitimate” faxing. NFIB called and wrote to members with a “survey” that asked what congressional district they were in and “[d]o you have a fax number so that we can send you the latest information about legislation and other issues dealing with businesses?” Later, NFIB used the fax numbers obtained with this “survey” to send a 5-page junk fax insurance advertisement. Needless to say this was not the “latest information about legislation and other issues dealing with

businesses.”¹

800 Toll-free Fax Numbers

It has become common for businesses to have a fax number that is an “800” or other toll-free fax number, particularly in national job advertisements inviting resumes.² Because the recipient pays for each call to that number, the TCPA prohibits using any autodialer to place calls to that a number. While there is an EBR exception created by the JFPA for EBR-based faxes, there is no EBR exception to the prohibition on autodialed calls to an 800 number. In clarifying the TCPA rules, the Commission should make clear that an EBR does not create an exception to the prohibition on autodialed calls being sent to “800” numbers without “prior express consent.”

Industry Comments Are Inconsistent

The theme of many industry comments is clearly just to oppose everything that favors the consumer using any argument they can think of, even if the argument are completely inconsistent. The comments of the American Road and Transportation Builders (“ARTBA”) and National Independent Automobile Dealers Association (“NIADA”) are just two examples of this internal inconsistency of many of the industry filings. They first claim that they should only have to comply with opt-out requests if they are sent using the “specified” cost-free opt-out notification mechanism “listed on an association’s coversheet” or else it would “compromise internal processes developed to respect such requests.”³ On the very next page, ARTBA argues that an association should not have to give an opt-out notice, because “[i]f an association member wants to be removed from fax

¹ See Appendix “A” hereto.

² Even more will be used in the future, as many companies will use 800 fax numbers as the “cost-free” opt-out method under the JFPA.

³ *Comments of the American Road and Transportation Builders*, at 3.

lists, they can call, write, or e-mail the association and they will be removed.” *Id.* at 4.

Similarly, NIADA argues that a sender should be able to ignore an “opt-out” request if was “made in a manner not specified by the sender in the facsimile advertisement”⁴ yet in the next page argues that an organization need not even identify a manner of making that “opt-out” because members can “opt-out of providing fax information at the time of applying for the membership⁵ and, upon becoming a member, will have contact information for the association readily available to opt-out at any time.”⁶ This invokes what can only be called a Kafkaesque scenario of being sent junk faxes by an organization that does not have to stop unless you say the “magic word” and ... they don’t have to tell you what the magic word is.⁷ The American Banker’s Association makes the same inconsistent arguments.⁸

Similarly inconsistent, membership organization decry the burden of maintaining records of when an EBR began with a member, but anyone who has been a member of such an organization knows that they will fax the Dickens out of a member to remind them when their membership (and dues) are up for renewal. Common sense and experience shows they can track important dates with respect to their members just fine.

An Opt-out Notice Is Needed to Protect Member and Non-members

Some industry commenters, like Lorman Education Services, agree with the state attorneys

⁴ *Comments of National Independent Automobile Dealers Association*, at 8.

⁵ Of course while many people thought they were safe from junk faxes from organizations they join by withholding their fax number from their membership applications, under the JFPA, those organizations can mine the Internet for those numbers now – defeating that protection used by many fax machine owners.

⁶ *Id.* at 9.

⁷ I am not suggesting that any organization would intentionally do such a thing, but I can assure you that it this would be raised as an argument against any organization that was caught sending illegal junk faxes.

⁸ *Comments of American Banker’s Association*, at 5 and 6.

general and consumers and oppose the opt-out notice exemption for tax-exempt nonprofits. Others make plausible (although flawed) arguments that a membership organization should not be forced to include an opt-out notice on its fax advertisements. For example, the ABA comments point to its on-line registration system where a *member* can log-in and change his or her fax preferences.

Every one of these commenters supporting the exemption ignores an important reality – incorrect fax numbers. Simply put, fax numbers can change and fax lists can have errors (particularly where they are “mined” from unreliable sources)... and while an organization may think it is faxing a member, in many instances it can be sending junk to a non-member, who necessarily needs the opt-out notice in order to stop the faxes since that person is not privy to the organization’s contact information.

Duration of the Faxing EBR

Several industry commenters agree that the 18/3-month bifurcated EBR duration is appropriate⁹ but suggest particular self-serving exceptions. The Society for Human Resource Management wants it to be 30 months for membership organizations (like itself) and Comerica believes that as long as someone with an EBR-based fax recipient does not object to faxes, the JFPA exemption for EBR-based faxes should *never* expire. This is untenable. What these faxers desire is easily accomplished not by exploiting an EBR beyond all reasonableness, but by a customer’s *request* to send the rate sheets, membership applications, or other materials. Such a request, like any contract, can be of whatever duration the parties choose, as long as it is consistent with the TCPA and “expressly” entered into and “expressly” states that advertising materials will be sent by fax, and not hidden in small print on the bottom flap of a cereal box.

⁹ See, e.g., *Comments of Comerica Inc.* ; *Comments of the Society for Human Resource Management*.

For example, Lorman Education Services complains in its comments about lost “revenue” if it can’t fax people who registered to attend prior seminars with its “fax reminder” program. What Lorman and similar commenters are missing is that each and every one of these people it would target with its junk faxes, filled out the registration information to attend a seminars. All Lorman needed to do was include a checkbox on the registration form “Please check here and print your fax number if you would like to be included in the ‘fax reminder’ program where we will send you advertisements for future seminars to your fax machine over the next 5 years.” *They don’t even need an EBR exemption.*

The sad fact is that business do not want to take this simple and 100% effective step to ensure their junk faxes are limited to people who want them because they know many people will simply not give that permission when it is stated plainly like that. Businesses would rather junk fax everyone they can and count on many people not taking the time to try to stop the faxes. Once again, if these junk faxes are really such a desired item, many people will ask for them. The fact that many do not, and businesses know they will not, is why businesses want the most liberal EBR rules.

Burden of Complying

Industry commenters such as Credit Union National Association have claimed that the 15 seconds for compliance with an opt-out request would be terribly burdensome. Lest we not forget, the same industry commenters claim that their faxes are highly desired and “valuable” to the recipients. If this is true, then there will be no burden since no one will opt-out. If instead, these fax advertisers are imposing large numbers of unwanted missives, they will get the needed “feedback” in that regard.

Location of Opt-Out Notice

Some commenters have pointed out an ambiguity with regard to where an opt-out notice must

be on a multi-page fax advertisement. At first blush, it may seem reasonable for the “opt-out” notice and proper identification to be included on only the “cover page” of a fax transmission. This will, unfortunately, open the door to a host of wild claims by fax broadcasters that any required information that is missing from a printed fax “was on the cover sheet that you threw away” when in fact, they never sent a cover sheet.

As a compromise, I would suggest that the “opt-out” notice only be required once, and may reside on either the cover page or each page of the advertisement, but that the legal names and addresses of both the advertiser and the broadcaster, *must* appear on each page that contains advertising. This is similar to other advertising regulations regarding mandatory disclosures. This also covers the situation where multi-page faxes may have advertisements from different advertisers.

Compliance Time

Some commenters, like Newsletter & Electronic Publishers Association, claim that there is no need to have a shortened time frame for complying with a DNF request because intentional faxing after a DNF request is the “modus operandi” of only a “junk” faxer who is “not likely to voluntarily comply” with such a request. This is incorrect and definitely not a justification for a liberal compliance time frame. Indeed, complying with opt-out requests is the one thing that many junk faxers *do* comply with because their real “modus operandi” is to stay under the radar and not get prosecuted. Junk faxers know that the people who complain or seek to opt-out are the most likely to make an FCC or AG complaint, or take legal action in response to further faxes. This is the one subset of fax recipients that the junk faxers would gladly block from any future faxes, because it preserves their ability to send to the millions of other hapless fax machine owners who are either unaware of the legal protections they have, or who have other things of a higher priority occupying their limited time.

The Commission has an ample record to limit duration of the EBR

Many industry commenters take the position that the Commission may only look at a prospective record in its decision to limit the time frame for an EBR and that certain “conditions” must be met. Both assertions are false. As pointed out in my initial comments in this docket, the JFPA makes clear that the “existence” of an EBR-based faxing exemption to the TCPA is to be considered, and not only actual EBR-based faxes. Nothing in the JFPA limits the inquiry to a prospective record. No does the JFPA require that the Commission must find one way or another on individual issues ... the statute only directs the Commission to consider a non-exclusive list of issues in the JFPA. There is no requirement that a majority, or even any of those issues must be found to exist as a condition precedent to the Commission limiting the time frame of a fax-based EBR.

Publication of Fax Numbers Without Opening the Floodgates

In my initial comments I urged the Commission to protect the ability of a business to distribute its fax number without having to subject the business to unwanted junk faxes. Even the Direct Marketing Association recognized that someone should be able to distribute a fax number in a directory or on a website and still have that number protected from being harvested by fax advertisers.¹⁰ The industry wants this ability to be accomplished with a notice accompanying distribution that the fax number is *not* to be use for fax advertisements. Consumers and fax machine owners naturally believe the opposite implementation – that a distributed fax number list should not be used for fax ads unless there is a notice accompanying publication that *permits* that use. Regardless of which method is chosen, it is clear that both sides agree that this ability to control

¹⁰ *Reply Comments of The Direct Marketing Association*, at 10.

subsequence use is appropriate and the Commission should adopt one of the two proposals.

Clarify that the JFPA applies only to faxes “based on” an EBR

Several commenters have pointed out that the JFPA was intended to create a limited exemption for EBR-based faxes, that is faxes sent “based on” an EBR, and not sent randomly with a “fax first, find EBR later if caught” business plan used by many junk faxers. Clearly, no legitimate fax broadcasters sending EBR-based faxes would be impacted by this clarification, and indeed, no industry comments have opposed it. Accordingly, the Commission should make clear that the “fax first, find EBR later if caught” is not a valid EBR-based fax and not permitted under the TCPA as amended by the JFPA.

Caller ID for Faxes

As the Commission is aware, a significant problem exists where fax broadcasters falsify the callerID data. This frustrates the ability of local phone company’s unlawful call centers to address the thousands of complaints this activity generates. As Verizon points out in its comments, while the local phone company can always determine what interexchange carrier (“upstream carrier”) the fax came from, they can not identify the actual originating number without assistance from that “upstream carrier.” Some of these upstream carriers have become havens for junk faxers, refusing to cooperate with other carriers to stop this activity.

The Commission should address this by first, as was done in the telemarketing context,¹¹ expressly requiring proper CallerID on all fax advertisement transmissions, even those sent within an EBR or made with express permission. There is no reason not to do so. Second, the Commission should rule that by providing callerID blocking or spoofing for fax advertisement, a carrier is

¹¹ It is arguable that this requirement already exists as a fax advertisement likely meets the definition of a “telephone solicitation” which subjects the sender to the Commission’s rules at 47 CFR 64.1200(d), including the callerID requirements.

“highly involved” so that liability for the illegal faxing is jointly shared by the carrier. Finally, when notified that its customer is engaging in falsifying callerID on junk faxes, that this constitutes “actual knowledge” and that carrier will be jointly liable for junk faxes from its customer.

In addition, the Commission should review other provision of its rules to provide strict regulation of means and methods used to falsify CallerID ... such activity is clearly fraudulent in any context of advertising transmissions. The Commission should also provide carriers the ability to take action against violators who burden the carrier’s business with the consequences of such activity, so a carrier can pursue a claim against the upstream IXC failing to take action to stop it.

Burden of Proof for Express Invitation or Permission to send Fax Advertisements

One area where there has been almost no disagreement among commenters, is with regard to the burden of proof for demonstrating that a sender obtained “prior express invitation or permission” to send a fax advertisement. Numerous filings by consumers, state attorneys general, and consumer groups support this provision. They are also joined by several industry groups which send EBR and permission-based fax ads such as National Association of Wholesaler-Distributors and National Independent Automobile Dealers Association.¹² Even the DMA recognized this burden would always essentially fall on the sender.¹³

As explained in my initial comments on this docket, this simple provision applied to both

¹² See, *Comments of National Independent Automobile Dealers Association*, at 8, 10; *Comments of Cardinal Health*, at 2; *Comments of Empire Corporate FCU*, at 3; *Comments of National Association of Wholesaler-Distributors*, at 13; *Comments of American Business Media*, at 7-8.

The only substantive comment in opposition was that of WestFax, a large fax broadcaster and reported junk faxer, whose comments were not based on sound legal analysis and in fact urged action that was well beyond the scope of the proceedings, including eliminating the TCPA itself as “not necessary.” But even Westfax argues that “A sender of a facsimile advertisement should have a consistent [sic] obligation to demonstrate that it complied with the TCPA/JFPA and where applicable, that it had the prior express invitation or permission (including an EBR) to send the facsimile advertisement at the time it was sent.” *Comments of WestFax*, at 10.

¹³ *Reply Comments of The Direct Marketing Association*, at 12.

“express invitation or permission” and existence of an EBR, is consistent with well settled jurisprudence, and allows the sender to decide for itself what form of proof it wishes to keep. Some will keep a signed form, some a simple log, while some will use different procedures. The decision of what form of evidence to retain will likely vary depending on the nature of the business, the nature of the faxes, as well as the frequency and volume. The Commission should leave it up to the sender to decide what it feels comfortable with since it will bear the burden of proof in any dispute.

Respectfully submitted, this the 2nd day of February 2006.

/s/
Robert Biggerstaff